

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33576

STATE OF IDAHO,)	2008 Unpublished Opinion No. 710
)	
Plaintiff-Respondent,)	Filed: November 17, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
MICHAEL KEITH McNABB,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Judgment of conviction for two counts of aggravated battery and one count of aggravated assault, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant. Elizabeth A. Allred argued.

Hon. Lawrence G. Wasden, Attorney General; Ann Wilkinson, Deputy Attorney General, Boise, for respondent. Ann Wilkinson argued.

WALTERS, Judge Pro Tem

Michael Keith McNabb appeals from the judgment of conviction entered upon his convictions on two counts of aggravated battery and one count of aggravated assault. McNabb contends that the district court erred in admitting the preliminary hearing testimony of a witness/victim on the finding that the witness was unavailable for trial. He further contends that he has been denied a speedy appeal, that his sentences are excessive and that the district court erred in denying his Idaho Criminal Rule 35 motion for reduction of those sentences. We affirm.

I.

BACKGROUND

On an April evening in 2006, McNabb and a group of his friends entered a Boise pool bar. The manager, Annette Knebel, personally knew McNabb as a frequenter of the establishment and saw him enter. Shortly thereafter and for no apparent reason, McNabb struck

a patron, Christopher Smith, in the back of the head with a broken pool cue. Smith blacked out. When Smith's friend, Curtis Coe, intervened, McNabb allegedly struck Coe with the cue. A waitress, Toni Webb, was on the phone, calling the police, when she was knocked to the ground by blows delivered by a member of McNabb's group. When Webb attempted to rise to her feet, McNabb came over and struck her in the face with the cue, knocking her unconscious. The McNabb group headed for the door. On their way out, McNabb allegedly hit two more patrons, Gunner Maughan and Justin Ward, with the cue. Another patron, Michael Snyder, followed the group out the door while calling 911 on his cell phone. Snyder saw McNabb get into the driver's seat of a white truck and was able to observe the license plate number. McNabb saw Snyder, exited the truck and swung the cue at Snyder, but missed him. McNabb then chased Snyder down an alley for a distance before ending his pursuit, returning to his truck and making his escape. The police stopped and arrested McNabb a short time later. At the scene of McNabb's arrest, both Knebel and Snyder identified McNabb as the assailant. Numerous victims were transported to a hospital for treatment for injuries suffered from the attacks.

McNabb was tried on six felony counts: five counts of aggravated battery for the blows delivered to Coe, Smith, Webb, Maughan and Ward and one count of aggravated assault for the attempt to strike Snyder. McNabb was also charged as a persistent violator of the law. Over a defense objection, the district court found that one of the victims, Curtis Coe, was unavailable for trial and allowed Coe's preliminary hearing testimony to be played at trial. McNabb took the stand in his defense and testified that although he was in the establishment when a fight broke out, he was not a participant in it and that this was a case of mistaken identity. The jury acquitted McNabb on the charge of aggravated battery against Coe, and all lesser included offenses, and was unable to reach verdicts on the aggravated battery charges involving Maughan and Ward. The jury returned guilty verdicts on the aggravated battery charges involving Smith and Webb and on the Snyder aggravated assault charge. McNabb admitted his status as a persistent violator.

The district court imposed unified terms of imprisonment of thirty-five years, with fifteen years fixed, on the aggravated battery convictions and a fixed term of five years on the aggravated assault conviction. The court ordered that the sentences be served concurrently. McNabb appealed. Thereafter, McNabb filed an I.C.R. 35 motion for reduction of sentence, which the district court denied.

II. ANALYSIS

A. The Admission of Coe's Preliminary Hearing Testimony Was Harmless

When victim Curtis Coe did not appear for trial, the prosecution sought to admit Coe's preliminary hearing testimony. McNabb objected. Following a hearing, the district court granted the state's motion and Coe's testimony was read into the record. Citing primarily *State v. Cross*, 132 Idaho 667, 669, 978 P.2d 227, 229 (1999), McNabb contends that the district court erred in its findings that Coe was unavailable for trial. He also asserts that the court erred in finding that an opportunity and similar motive for cross-examination existed at the time of the preliminary hearing.

After reviewing the record, we conclude that even if the district court erred by allowing the state to use Coe's testimony from the preliminary hearing, the error was harmless and does not require reversal of McNabb's convictions.

To hold an evidentiary error harmless, this Court must find beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence. *State v. Field*, 144 Idaho 559, 572, 165 P.3d 273, 286 (2007); *State v. Robinett*, 141 Idaho 110, 113, 106 P.3d 436, 439 (2005). Whether an error is harmless in a particular case depends upon a host of factors, including the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. *State v. Hooper*, 145 Idaho 139, 146, 176 P.3d 911, 918 (2007); *State v. Green*, 136 Idaho 553, 557-58, 38 P.3d 132, 136-37 (Ct. App. 2001).

Coe's preliminary hearing testimony was succinct. He testified that he saw McNabb strike his friend, Christopher Smith, in the back of the head with a pool cue, that he then punched McNabb, and that McNabb then hit him with the cue. Save for Coe's identification of McNabb as an assailant in the bar, Coe did not testify to any facts pertaining to two of the convictions: the aggravated battery against Toni Webb and the aggravated assault against Michael Snyder. The jury did, however, convict McNabb of committing an aggravated battery on Christopher Smith and Coe testified to his observations of that battery. Thus, for harmless error purposes, this Court must look to the weight of evidence other than Coe's testimony to establish McNabb's

identity as the assailant in the bar in general (which applies to all of the convictions) and to establish the facts of the aggravated battery against Christopher Smith.

Christopher Smith testified that he was playing pool with his friend, Curtis Coe, when he was struck in the head from behind. He did not see his assailant. Other witnesses, however, testified that they observed McNabb striking various people with a broken pool cue. Among these, Annette Knebel, the bar manager, testified that she knew McNabb by name because he had been in the bar many times before, that she saw him enter the establishment on the night in question, and that she served him. Knebel testified that she personally observed McNabb strike a patron in the head with a cue in the pool table area, that she had obtained that person's driver's license when he checked out pool balls, and that the man's name was "Christopher." Knebel further saw McNabb strike waitress Toni Webb in the face with the cue. She followed McNabb out of the bar and saw him get into a white pickup truck and drive away. After McNabb was stopped by the police, Knebel identified McNabb as the assailant.

Michael Snyder, the victim of the aggravated assault, testified that he was playing pool with his wife. Two men were playing pool at an adjoining table. Snyder's wife knew one of the men and introduced him to Snyder as "Curtis." Snyder testified that he saw McNabb strike Curtis's friend (who would be Christopher Smith) in the head with a broken pool cue. Snyder then saw McNabb strike the "waitress," who was on the phone, in the face with the cue. Snyder then followed McNabb out of the bar and got the license plate number of McNabb's truck. McNabb then got out of the truck, swung at Snyder with the cue, but missed, and chased Snyder down an alley for a distance. After McNabb's truck was stopped by the police, Snyder was taken to the scene of the arrest where he identified McNabb as the assailant. Both Snyder and Knebel identified McNabb in court as the assailant.

Thus, the state presented strong evidence establishing both McNabb's identity as the assailant in the bar in general and as the batterer of Smith specifically. We also note that the jury apparently discounted much of Coe's testimony as it acquitted McNabb on the charge that he committed an aggravated battery involving Coe as the victim and, in addition, all lesser-included offenses to that charge. We are convinced beyond a reasonable doubt that the jury's verdicts would have been the same absent Coe's testimony.

B. Denial of Speedy Appeal

McNabb next contends that the court reporter's delay in preparing his transcripts for this appeal denied him his due process right to a speedy appeal and that his convictions should be vacated.

In *State v. Gallipeau*, 128 Idaho 1, 3-4, 909 P.2d 619, 621-22 (Ct. App. 1994), this Court recognized that "extraordinary dereliction" in the timely preparation of transcripts may constitute a deprivation of due process where the appropriate showing of prejudice is made. However, where the transcripts are eventually produced and the issues regarding the validity of the convictions are determined to lack merit, and a remand for retrial is thus unnecessary, prejudice in the impairment of the defense in the event of a retrial cannot be shown. *State v. Gray*, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997) (citing *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993)).

Here, we have reviewed McNabb's sole claim of reversible error attendant to his convictions and have found that, assuming error, the alleged error was harmless. In this circumstance, McNabb's request for relief in this appeal on the ground that he has been denied a speedy appeal is without merit.

C. Sentence Review

McNabb contends that his concurrent unified sentences of thirty-five years, with fifteen years fixed, on the aggravated battery convictions and five years fixed on the aggravated assault conviction are excessive.

The standards are well established. Appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). A court does not abuse its discretion if (1) the court recognizes the decision as one of discretion, (2) the court acts within the bounds of that discretion and applies appropriate legal standards, and (3) the court reaches the decision through an exercise of reason. *State v. Moore*, 131 Idaho 814, 819, 965 P.2d 174, 179 (1998). An abuse of discretion will be found only if, in light of the governing criteria, the sentence is excessive under any reasonable view of the facts. *State v. Charboneau*, 124 Idaho 497, 500, 861 P.2d 67, 70 (1993); *State v. Kerchusky*, 138 Idaho 671, 679, 67 P.3d 1283, 1291 (Ct. App. 2003). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public

interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726-27, 170 P.3d 387, 391-92 (2007). Where reasonable minds might differ as to the length of the sentence, this Court will not substitute its view for that of the district court. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992); *Kerchusky*, 138 Idaho at 679, 67 P.3d at 1291; *State v. Admyers*, 122 Idaho 107, 108, 831 P.2d 949, 950 (Ct. App. 1992). The primary objectives of a sentence of confinement are to protect society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). A sentence need not serve all the sentencing goals or weigh each one equally. *State v. Dushkin*, 124 Idaho 184, 186, 857 P.2d 663, 665 (Ct. App. 1993).

McNabb's attack on several people, using a broken pool cue as a club, was both unprovoked and vicious. He struck at least two people in the head with the weapon and his physical assaults sent several of the victims to the hospital for treatment of their injuries. One of the victims was a diminutive young female employee of the establishment, whose offending conduct was that she was on the phone to the police. McNabb struck her in the face with the cue, knocking her unconscious and leaving a permanent scar. McNabb showed no remorse for his conduct. McNabb's crimes occurred while he was on probation for two prior felony convictions. For a twenty-one-year-old, McNabb has a significant prior criminal record, evidencing disrespect for the law and he has previously served penitentiary time on a rider. While he was incarcerated pending trial, McNabb got into a fight with another inmate. He refused to comply with jail personnel orders to stop punching the man in the face and ceased only after he was sprayed with mace. Under these circumstances, the sentences, while harsh, are warranted and McNabb has failed to show that the district court abused its discretion in imposing the sentences.

D. Denial of Motion for Reduction of Sentences

After sentencing, McNabb filed an I.C.R. 35 motion for reduction of his sentences. McNabb provided new information that he was now remorseful for his conduct, opined that he does not pose a threat to society and informed the court that he had conducted himself as an exemplary prisoner at the penitentiary with an excellent prognosis for rehabilitation. The district court denied the motion. McNabb contends that the district court abused its discretion in denying the motion.

A Rule 35 motion to reduce a legal sentence imposed in a legal manner is addressed to the sound discretion of the district court. *State v. Adair*, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008); *State v. Arambula*, 97 Idaho 627, 630, 550 P.2d 130, 133 (1976). A court does not abuse its discretion if (1) the court recognizes the decision as one of discretion, (2) the court acts within the bounds of that discretion and applies appropriate legal standards, and (3) the court reaches the decision through an exercise of reason. *Moore*, 131 Idaho at 819, 965 P.2d at 179. A Rule 35 motion for reduction of sentence is a plea for leniency. *State v. Shutz*, 143 Idaho 200, 203, 141 P.3d 1069, 1072 (2006). If the original sentence is not excessive, then the defendant must show at the trial court level that additional facts or information make the sentence excessive in light of that additional information. *Adair*, 145 Idaho at 516, 181 P.3d at 442; *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007).

The district court ruled that the facts of the instant case showed egregious and extremely violent conduct by McNabb and that the new information provided did not warrant a reduction of the sentences. We find no abuse of discretion in the district court's denial of Rule 35 relief.

III.

CONCLUSION

The convictions, the sentences and the order denying relief from those sentences are affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**